TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 291

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN CROMWELL, ET AL., ETC., APPELLANTS,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED FEBRUARY 21, 1925

(30,888)

(30,888)

SUPREME COURT OF THE UNITED STATES

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No. 291

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN CROMWELL, ET AL., ETC., APPELLANTS,

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APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1925

[fol. 1]

IN COURT OF CLAIMS

No. B-13

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN CROMWELL, Arthur Iselin, George A. Vondermuhll, Oliver Iselin, and Kenneth P. Budd, Co-partners, Doing Business under the Firm Name of William Iselin & Company, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed January 31, 1922

To the Honorable the Judges of the Court of Claims:

The petition of William E. Iselin, James W. Cromwell, Lincoln Cromwell, Arthur Iselin, George A. Vondermuhll, Oliver Iselin and Kenneth P. Budd, co-partners, doing business under the firm name of William Iselin & Company, the plaintiffs above named, respectfully shows to the court and alleges:

First. Said plaintiffs are the owners of the claim herein set forth. No assignment or transfer of said claim or any part thereof or interest therein has been made, and said plaintiffs are justly entitled to the amount herein claimed from the United States of America after allowing all just credits and offsets. Said plaintiffs are and at all times hereinafter mentioned were engaged in business and trading under the firm name of William Iselin & Company and said firm of William Iselin & Company is and at all times hereinafter mentioned was a co-partnership composed of said plaintiffs. Said plaintiffs have, and each of them has, at all times borne true allegiance to the Government of the United States of America, and have not, nor has any of said plaintiffs, in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

[fol. 2]

Second. Petitioners' claim for the sum of $30,000.00 is based upon a written contract evidenced by an offer in writing dated February 2, 1920, made by plaintiffs, by their representative, E. I. McDowell, duly authorized thereto, and addressed to Materials Disposal & Salvage Division, Office of the Director of Air Service, United States of America, and an acceptance of said offer by said Materials Disposal & Salvage Division Office duly acting for the United States of America, by letter dated February 10, 1920, signed on behalf of the Government of the United States, War Department, by Robert Coker, Captain, A. S. A., District Manager, Materials Disposal & Salvage Division, by Frank W. Weeks, Sales Manager.

Third. The agreement arising from the said offer and the acceptance thereof was entered into in the following circumstances:

On or prior to February 2, 1920, a salesman acting for defendant and carrying Government samples, called on plaintiffs and invited them to bid on surplus aeroplane linen held by defendant, stating that the surplus linen so offered for sale was according to the samples then shown and of first quality.

On February 2, 1920, plaintiffs, through their representative, E. I. McDowell, duly authorized thereto, offered, by the following letter, to purchase a part of this aeroplane linen:

[fol. 3] "New York, Feb. 2nd, 1920.

Materials Disposal & Salvage Division, Office of the Director of Air Service, Building B, Sixth and B Sts. N. W. Washington, D. C.

GENTLEMEN: I herewith submit my firm offer for approximately 168,400 yards of 38-inch Grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

This offer is for immediate acceptance on usual Government terms.

Yours very truly, E. I. McDowell."

This offer was accepted by the Materials Disposal & Salvage Division Office, duly acting for defendant, by letter dated February 10, 1920, as follows:

"War Department, Air Service, Materials Disposal & Salvage Division, New York District Office

February 10, 1920.

From: Air Service, Materials Disposal and Salvage Division, N. Y. District.

To: E. I. McDowell, 20 Thomas St., N. Y. C.

Subject: Sale No. 2545.

1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.

2. Inasmuch as we have your check for $13,987.20 to cover 10% [fol. 4] of the sale, it is requested that you send this office Certified Check for $125,884.80 to cover the balance due together with your shipping directions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award.

Robert Coker, Capt., A. S. A., District Manager M. D. & S. Division, by F. W. Weeks, Frank W. Weeks, Sales Manager."

Fourth. Pursuant to said agreement 144,245½ yards of linen were delivered to plaintiffs and duly paid for at the rate of ninety-three cents per yard.

Fifth. Said linen was not of the grade and quality represented by defendant and agreed to be purchased by plaintiffs and sold by defendant as aforesaid, but on the contrary was of poor quality and in consequence plaintiffs were damaged in the sum of Thirty thousand dollars ($30,000) after allowing all refunds or offsets.

Sixth. Subsequent to the delivery of said linen to plaintiffs, officers of the defendant, duly authorized and directed thereto, inspected said linen and admitted that it was not of first quality.

Seventh. Subsequent to the delivery of said linen to plaintiffs, plaintiffs claimed compensation from defendant on account of the breach of the agreement above set out, and the defendant's officers and agents, duly authorized and directed thereto, while admitting [fol. 5] that plaintiffs were entitled to compensation, were of the opinion that they were without authority to make such compensation. Copies of the opinions of the Comptroller General and of the Acting Judge Advocate General are attached hereto marked Annex A and Annex B respectively.

Wherefore, your petitioners pray that their said claim may be duly approved and allowed by this Honorable Court and that a judgment for the payment thereof be granted.

Barry, Wainright, Thacher & Symmers, Attorneys for Plaintiffs, 59 Wall Street, Borough of Manhattan, New York City, by Dallas S. Townsend.

Sworn to by Oliver Iselin. Jurat omitted in printing.

[fol. 6] Annex A, General Accounting Office, Washington

Review No. 445

December 17, 1921.

Wm. Iselin and Company applied November 28, 1921, for a review of the action of the War Department Division of the General Accounting Office in disallowing by settlement No. 764581, dated October 25, 1921, its claim for $26,828.92 on account of damages alleged to have resulted from the fact that a certain quantity of linen

purchased by the claimant from the Air service of the Army did not comply with the requirements of the terms of sale.

It appears that after a representative of the Air Service had called on claimant and exhibited a sample of aeroplane linen to be sold by the Government, claimant submitted an offer of 93 cents per yard for approximately 168,400 yards of linen, giving certain specifications and further stipulating "goods to be firsts."

In advertising this linen for sale it was stipulated that the material would be sold "as is;" that physical inspection was invited; that the specifications and quantities on hand were based upon best information available; and that no guarantee on behalf of the Government was given.

It is admitted by the Air service that the advertisement did not come to claimant's notice until after its bid had been submitted and accepted. As the bid submitted was accepted unconditionally I think there can be no doubt that the Government obligated itself to furnish linen in accordance with the specifications and description given by the claimant in its bid and that upon failure of the linen to comply with said requirements the sale could have been rescinded, the goods immediately returned and the purchase price refunded. It appears, however, that the imperfections of the linen were not discovered until about five months after delivery and after a considerable quantity [fol. 7] had been processed, thereby making it impossible to rescind the sale and return the material in the condition in which it was in when delivered. But under the circumstances I do not think the delay in discovering that the linen was defective can operate to relieve the Government of all liability under its obligation to furnish linen of the character, quality and condition stipulated in the sale agreement. However, the claim is clearly one for damages resulting from a breach by the Government of the sale contract and there is no appropriation available for the payment of such claims. Therefore, the claim can not be adjudicated by and paid on the certificate of the General Accounting Office, under any appropriation.

In a report dated September 21, 1921, the chief, Material Disposal and Salvage Division, by authority of the chief of Air Service, stated that the funds received from this sale were being held in "suspense account" and would continue to be so held until settlement of this claim. I infer from this that the funds are carried in a special deposit account and have not been covered into the Treasury. If such be the case I see no reason why the War Department should not determine the extent of the damage and refund the amount thereof to claimant from the proceeds of sale.

The amount claimed is 20% of the net amount paid by claimant for the linen delivered and is based on the assumption that the value of linen "seconds" is 20% less than the value of "firsts." This assumption may or may not be correct. The evidence before me is not sufficient upon which to base a determination on that point.

It appears that there were "numerous other bidders" for the linen sold to claimant and it is possible that some, if not all, of the other bidders offered to buy the linen "as is" in accordance with the published advertisement without any guarantee from the Government.

If so, it would seem that the highest bid on these terms would be proper evidence as to the actual value of the linen sold and that the difference between said value and the amount paid by claimant would [fol. 8] be a fair and reasonable measure of damages in this case and if said amount is acceptable to claimant its payment from proceeds of sale, if not yet covered into the Treasury, would seem to be authorized.

If the proceeds of sale have been covered into the Treasury it would be proper for the War Department to determine the amount of the damage and report the matter to Congress for an appropriation.

Upon a review of the matter no differences are found and the settlement is sustained.

J. L. McCarl, Comptroller General.

ANNEX B

Contracts. Finley:wrs. JAG 400.703. War Department, J. A. G. O. 2nd Ind.

June 14, 1921.

To the Director of Sales:

1. By order of the Assistant Secretary of War you submit to this office for remark and recommendation the claim of William Iselin & Company of New York for an allowance of 20% upon the purchase price of certain brown airplane linen purchased of the Government by said Company on the ground that the accepted purchase offer was for "firsts" while delivery was of "second."

2. By publication in Air Service bulletins and trade papers the linen in question was offered for sale by the Government, such published notices describing the goods offered, but containing no representation as to their quality. Bids were to be received until 3 o'clock p. m., February 2, 1920. In January, 1920, a sales agent of the Government called upon the firm of William Iselin & Company, exhibited a sample of linen and offered same for sale. This firm thereupon through one E. I. McDowell, submitted a bid in the following language:

"I herewith submit my firm offer for approximately 168,400 yards [fol. 9] 38-inch Grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93c per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

"This offer is for immediate acceptance on usual Government terms."

The bid was accepted and notice of acceptance given by letter as follows:

"This is to advise that Washington has awarded you 150,400 yards of 38" Grade "A" Airplane Linen at 93c. per yard. This linen is listed on sheet 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.

"Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office Certified Check for $125,884.80 to cover the balance due together with your shipping directions.

"This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Material Disposal & Salvage Division, 350 Madison Ave., N. Y. C.

"Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

Deliveries were thereupon made to claimant and the full purchase price paid in the sum of $139,872.00. No complaint as to the goods sold or their quality seems to have been made to the Government's representatives until some time in June, 1920, when upon re-sale as "firsts" after bleaching a customer rejected a consignment as not "firsts." Iselin & Company claim that an examination then made disclosed that the linens were not "firsts" and referred the matter to the New York representative of the Government sales agency, the Material Disposal and Salvage Division, Office of the Director of Air Service of the Army, and was advised to continue the bleaching op- [fol. 10] erations and make claim for an allowance from the Government for damages sustained. The said New York representative denies having so advised claimant. Iselin & Company continued the bleaching operations until substantially all the linen was so processed. The claim of 20% on the purchase price of the entire yardage is based on the alleged difference in value between first and second quality linens.

Certain objections are made by the purchaser going to the quantity, grade and color of the goods delivered. For the most part these contentions are disputed by the Air Service. It appears, however, that the Air Service has caused an inspection of the remaining unbleached fabric by an expert fabric inspector who found that the linen while bought by the Government as Grade "A" or "firsts" quality was not in fact first quality. It does not appear what significance or meaning is attached in the trade to the expression "goods to be firsts" and therefore it is not possible to say whether that condition of the sale has been fulfilled or not; but in the view taken by this office it is immaterial to consider that question or the correctness of the arbitrary claim of 20% of the purchase price as the basis of the claimant's damage.

3. Although the advertisements of the Government did not describe the offered linen as "firsts," but on the contrary offered the goods "as is," expressly disclaiming a guarantee on behalf of the Government, yet the offer of Iselin & Company departed from the terms of the advertisement and was conditioned "goods to be firsts."

This offer was unconditionally accepted by the Government's representatives and the Government thereby became obligated to deliver goods of the quality so defined, regardless of the conditions of the prior advertisement. If the goods delivered were not "firsts" as that term is understood in the linen trade the purchaser had the option either of rescinding the sale contract and returning the goods or of keeping the goods and asserting a claim of damages for the breach of contract. Since by reason of the bleaching process the purchaser has [fol. 11] put it out of his power to return the goods in their original form, he is relegated to a claim for damages as his only remedy if he has been injured. Such a claim for damages is, of course, unliquidated in amount and therefore the administrative officers of the War Department are without authority to entertain or adjust it. Claims for unliquidated damages on account of contracts of the War Department are cognizable by the proper accounting officers of the Treasury Department or as legal actions in the Court of Claims. It is recommended that the claimant be advised accordingly.

E. A. Kreger, Acting Judge Advocate General.

[fol. 12] II. General Traverse—Apr. 3, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission of Case

On January 13 and 14, 1925, this case was argued and submitted on merits by Mr. Dallas S. Townsend, for the plaintiffs, and by Mr. John E. Hoover, for the defendant.

[fol. 13] IV. **Findings of Fact, Conclusion of Law, and Opinion by Downey, J.**—Entered January 26, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

The plaintiffs are citizens and residents of the United States, and in all respects duly qualified to sue as plaintiffs in this court. At all times material herein they were engaged in business as copartners, doing business under the firm name of William Iselin & Company.

II

In January, 1920, the United States, through the Material Disposal and Salvage Division of the office of the Director of Air Service of the Army, was in possession of a considerable quantity of surplus airplane linen which it desired to sell.

III

In January, 1920, two different parties claiming to be authorized representatives of the United States in that behalf exhibited samples and solicited bids from the plaintiff for the purchasing by it of said linen, and on January 19, 1920, the plaintiff, by E. I. McDowell, acting in that behalf, submitted to Harry Stultz, one of said parties, a bid, to him addressed, for said linen, referring to it as "approximately 168,400 yards," the aggregate of the two items mentioned in the advertisement hereinafter referred to, at 0.85 per yard "linen to be as per sample herewith."

Said Stultz was not an authorized representative of the United States with authority to sell said linen, but was operating in his own behalf, and no proceeding was had under said bid, so far as appears [fol. 14] from the record. On February 2, 1920, said Stultz submitted to the material disposal and salvage division of the Air Service a bid for identic quantities of said linen in two items as in said advertisement set out, at a price of $0.87\frac{1}{2}$ per yard.

IV

Previous to the submission of said bid by the plaintiff to said Stultz, namely, on January 15, 1920, the material disposal and salvage division of the Air Service had advertised in different publications, among them the Journal of Commerce and Commercial Bulletin, published in the city of New York, the proposed sale of a number of items of surplus material on hand, said aircraft linen included, in two items of 68,400 yards and 100,000 yards, and invited bids therefor, bids to close February 2.

In said advertisement the aircraft linen to be sold was described as grade A; it was stated that bids might be made for 1,000 yards or multiples thereof, or for any entire lot; that bids would be received until 3 o'clock a. m., of February 2, 1920; that the bidders would be notified on or before February 5, of the yardage awarded, upon receipt of which notification they would be required to forward a check or draft for 10 per cent of the purchase price, all materials to be removed and paid for within 30 days; that the materials would be sold "as is" at point of storage; that inspection is invited and that "specifications and quantities on hand are based upon the best information available, but no guaranty on the part of the Government is given."

V

It does not appear that the representative of the plaintiff acting in its behalf had seen the advertisement referred to at or before the

time that the bid was submitted to said Stultz, but said advertisement came to his attention very shortly thereafter and before February 2, 1920, under which date the said representative of the plaintiff, namely, E. I. McDowell, acting for and on behalf of the plaintiff, submitted to the Materials Disposal and Salvage Division of the Air Service the following bid:

New York, Feb. 2nd, 1920.

Materials Disposal & Salvage Division, Office of the Director of Air Service, Building B, Sixth and B Sts. N. W., Washington, D. C.

GENTLEMEN: I herewith submit my firm offer for approximately 168,400 yards of 38-inch grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

This offer is for immediate acceptance on usual Government terms.

Yours very truly, E. I. McDowell.

[fol. 15] VI

Under date of February 10, 1920, after the opening and consideration of the bids submitted under said advertisement, there was sent to plaintiff's said representative the following communication:

War Department, Air Service, Materials Disposal & Salvage Division, New York District Office

February 10, 1920.

From: Air Service, Materials Disposal and Salvage Division, N. Y. District.
To: E. I. McDowell, 20 Thomas St., N. Y. C.
Subject: Sale No. 2545.

1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955, item 1—65,400 yards, and sheet No. 2879, item 6—85,000 yards.

2. Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office certified check for $125,884.80 to cover the balance due, together with your shipping directions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award.

Robert Coker, Capt., A. S. A., District Manager M. D. & S. Division, by F. W. Weeks, Frank W. Weeks, Sales Manager.

It does not appear that there was any acceptance of plaintiff's bid otherwise than as embodied in the communication last above quoted.

VII

Thereafter, at various times, deliveries were made to the plaintiff and payments made by it for such deliveries, at the rate of its bid price of 0.93 per yard. The deliveries were short of the estimated quantity, for which storage a proper proportion of repayment was made to the plaintiff, leaving the aggregate amount paid by the plaintiff, $134,144.60.

VIII

Sometime after the purchase of the linen by the plaintiff, namely, about May, 1920, it resold 30,000 yards thereof, for delivery in June, said linen to be bleached by the plaintiff and delivered in that condition at $1.60 per yard. After being bleached this linen was de- [fol. 16] livered to the purchaser but was by him rejected on the ground that by reason of defects therein it was not of first quality. It was however, agreed that another 30,000 yards should be substituted therefor, which was done by selection from the entire lot, and after bleaching was delivered. The purchaser maintained that this lot was likewise not of first quality, but the plaintiff's contention was that it was in fact of that quality.

By reason of this rejection upon the ground that the linen was not of first quality, complaint was made by the plaintiff to the Material Disposal and Salvage Division, as a result of which there were several detailed inspections of the materials by experts representing both parties. The defects discovered were of a minor character but they were such as to warrant the conclusion that the linen as a whole was not of first quality. It does not appear that it was not grade A.

IX

The term "grade A" is a term of construction. The term "firsts" and "seconds" are terms of quality. The term "grade A" was used in the trade, entirely separate and apart from the designation of quality as indicated by the terms "firsts" and "seconds," and if the construction of a fabric was such as to entitle it to the designation "grade A" it was grade A, irrespective of quality.

X

At the time of this transaction linen of the quality designated as "seconds" was worth, in the trade, approximately 25% less than

"firsts." It does not appear from the record at what price or prices the plaintiff sold this linen or what actual loss, if any, it sustained in connection with the purchase and sale thereof.

Conclusion of Law

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover, and it is therefore adjudged that plaintiff's petition be dismissed with judgment in favor of the United States for cost of printing the record herein, to be taxed and collected by the clerk.

Opinion

Downey, Judge, delivered the opinion of the court:

The plaintiff bid to the material disposal and salvage division of the Air Service of the Army for the purchase of a large quantity of surplus airplane linen, specifying in its bid that the goods should be firsts. An award was thereafter made to plaintiff of certain quantities of grade A airplane linen, and the award was no doubt made in response to plaintiff's bid. Previous to the submission of the bid the proposed sale of these and other materials had been advertised in trade journals, the advertisements stating the terms and conditions of the sale and plaintiff's representative had seen this advertisement before submitting its bid. The form of the bid and award are material. In lieu of repetition here reference is made to Findings V and VI.

[fol. 17] The contention is that the United States accepted plaintiff's bid, including the stipulation that the goods should be "firsts," that they were not in fact "firsts," and that the plaintiff, having paid for the goods at the bid price before this condition was discovered, suffered loss by reason thereof.

There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis.

Plaintiff's theory is, and necessarily so, that there was an acceptance of its bid, the imposed condition as to quality included, and in this contention is found the fundamental error. Confusion in connection with its consideration is to be avoided by suggesting that, used in relation to fabrics, "grade A" and "firsts" do not mean the same thing. "Grade A" is a term of construction, referring to the number of threads per inch crosswise and lengthwise, etc., while "firsts" is a term of quality, so that a fabric may be grade A and not be of first quality.

Previous to the submission of its bid plaintiff's representative had seen the advertisement published in trade journals for the sale of this and other materials, in which in two items this linen is referred to as grade A. It may readily be assumed, since the plaintiff was

engaged in the business of handling fabrics, that it was fully conversant with the fact that grade A did not necessarily mean first quality, and that this knowledge on its part furnishes the motive for the injection into its bid of the stipulation that the goods should be firsts.

The essential error is in assuming that there was an acceptance of plaintiff's bid. In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word "accepted" or any word of similar import used, or any reference to plaintiff's bid. This communication notified plaintiff of the award to it of a quantity of linen, which might or might not comply with the stipulation as to quality contained in plaintiff's bid, and can not by any possibility be construed as an acceptance upon the condition attempted to be imposed that the goods were to be firsts.

The award was in accordance with the terms of the published advertisement, with which plaintiff's authorized representative was familiar, and while it is not necessary to decide the question, it may be suggested that it probably was the only sort of an award authorized. The bid and the award being at variance in an essential particular, it can not be contended that the award constituted an acceptance of the bid.

"A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modifications suggested." Minneapolis & St. Louis Ry. v. Columbus Rolling Mill, 119 U. S. 149, 151. See also National Bank v. Hall, 101 U. S. 43, 50.

[fol. 18] Aside from the conclusion to be drawn from the terms of the bid and the award, it is to be noted that the advertisement, with which plaintiff was familiar before the submission of the bid, provided that the materials would be sold "as is" at point of storage, invated inspection, and provided that no guarantee on behalf of the Government is given.

When the plaintiff received the notice of the award to it of this linen in the terms in which it was couched it was bound to observe that there was no acceptance of other conditions which it had seen fit to impose in the submission of its bid, and since the bid and the award did not constitute a contract it was at liberty to decline to proceed further with the transaction. This it was in better position to do because the terms of sale did not require any advance payment by bidders.

For the reasons stated and apparantly without necessity of going further into the details of the transaction we have concluded that plaintiff is not entitled to recover and have directed judgment according.

Graham, Judge; Hay, judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 19] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 26th day of January, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the Uninted States; and that the petition herein be and it hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Six hundred and thirty-one dollars and three cents ($631.03), the cost of printing the record in this court to be collected by the Clerk, as provided by law.

By the Court.

[fol. 20] VI. PETITION FOR APPEAL—Filed February 5, 1925

From the judgment rendered in the above-entitled cause on the 26th day of January, 1925, in favor of the defendant, the plaintiffs, by their attorneys of record, on the 4th day of February, 1925, make application for and give notice of, an appeal to the Supreme Court of the United States.

Barry, Wainwright, Thacher & Symmers, by Dallas S. Townsend, Attorneys of Record, 59 Wall Street, New York, N. Y.

VII. ORDER ALLOWING APPEAL

It is ordered by the court this 9th day of February, 1925, that the plaintiffs' application for appeal be and the same is allowed.

[fol. 21] IN COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Downey, J.; of the judgment of the court; of the plaintiff's application for appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 12th day of February, A. D., 1925.

F. C. Kleinschimdt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,888. Court of Claims. Term No. 291. William E. Iselin, James W. Cromwell, Lincoln Cromwell, et al., etc., appellants, vs. The United States. Filed February 21, 1925. File No. 30,888.

No. 291.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN CROMWELL, ARTHUR ISELIN, GEORGE A. VONDERMUHLL, OLIVER ISELIN AND KENNETH P. BUDD, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF WILLIAM ISELIN & COMPANY, *Appellants*,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF THE APPELLANTS.

DALLAS S. TOWNSEND,
Attorney for Appellants.

(30,888)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN CROMWELL, ARTHUR ISELIN, GEORGE A. VONDERMUHLL, OLIVER ISELIN and KENNETH P. BUDD, copartners, doing business under the firm name of WILLIAM ISELIN & COMPANY, Appellants,

v.

THE UNITED STATES.

No. 291

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF THE APPELLANTS.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims, entered January 26, 1925, dismissing the petition of the Appellants in that Court upon Findings of Fact after trial (Transcript of Record, p. 13, 60 C. Cls. R. 255).

As will appear from an examination of the opinion of the Court below (Transcript of Record, at pp. 11 and 12), that Court did not consider it "necessary" in its Findings of

Fact to cover all the issues, "since the merits of the case", in the Court's view, were "to be determined upon another basis". Nevertheless, it is believed that the facts appearing in the Record sufficiently indicate the principal points of the case.

At and for some time prior to February 2, 1920, the War Department was in possession of a large quantity of airplane linen, left over from the war. It was "surplus property" (Finding II, Transcript of Record, p. 8). The Government desired to sell it and the Secretary of War was authorized by the Act of Congress of July 11, 1919, the Army Appropriation Act for the fiscal year ending June 30, 1920, to sell this property "upon such terms as may be deemed best" (41 Statutes at Large 105, U. S. Comp. Stat. 1923 Sup., Sec. 6941*c*).

The War Department advertised certain surplus property, including this linen, for sale "as is", *i. e.*, without warranty as to quality, bids to be received until 3 P. M., February 2, 1920 (Transcript of Record, pp. 4, 5, 8). Two alleged representatives of the United States exhibited samples of the linen to the Appellants, claiming to be authorized to act for the United States, and the Appellants made an offer on January 19, 1920, to one of these alleged representatives to purchase the linen, incorporating in their offer a stipulation that the quality of the linen would be in accordance with the sample shown them (Transcript of Record, p. 8). However, as the Court of Claims found (Transcript of Record, p. 8) this alleged representative had no authority to act for the United States, and, although immaterial, it is a fair inference from the Findings that the Appellants discovered this lack of authority, because on February 2, 1920, they made a new offer directly to the Government to purchase a quantity of the linen. Their offer read as follows:

> "I herewith submit my firm offer for approximately 168,400 yards 38-inch Grade A natural brown Irish Airplane Linen. Specification: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105.

Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93¢ per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.

This offer is for immediate acceptance on usual Government terms."

Transcript of Record, pp. 2, 5, 9.

It is with this offer that the present appeal is concerned. The term "Grade A" is a term of textile construction, having nothing to do with the quality of the fabric, but the term "firsts" refers to textile quality (Finding IX, Transcript of Record, p. 10).

It will be noted that this offer makes no reference to the advertisements of the linen, which the Court below found came to the Appellants' attention (Transcript of Record, p. 9), but invites acceptance on a different basis, namely, the linen to be "as per sample submitted" and "goods to be firsts". In the language of the Judge Advocate General, the Appellants' offer "departed from the terms of the advertisement and was conditioned 'goods to be firsts'" (Transcript of Record, p. 6).

The next letter in point of time given in the Findings of Fact was a letter from the War Department to the Appellants, February 10, 1920, which read as follows:

"1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.

2. Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office Certified Check for $125,884.80 to cover the balance due together with your shipping instructions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

Transcript of Record, pp. 2, 6, 9.

The Appellants contend this letter was an acceptance of their offer, and the Comptroller General and Judge Advocate General so decided.

The linen had been bought by the Government as linen of "first quality" (Transcript of Record, p. 6), and the officials of the War Department no doubt believed it to be such.

It may be observed that this letter was written five days after February 5, the date on which bidders under the advertisements were to be notified of the yardage awarded them (Transcript of Record, p. 8), and also that the Appellants had then paid $13,987.20 and were requested to make an additional payment of $125,884.80 "to cover the balance due". The Court below in its opinion stated that "the award was no doubt made in response to plaintiffs' bid" (Transcript of Record, p. 11). Presumably the "balance due" of $125,884.80 was due pursuant to Appellants' letter of February 2 and the Government's letter of February 10.

It was and is the position of the Appellants that these two letters evidenced a contract. The Comptroller General and the Judge Advocate General had previously reached this conclusion (Transcript of Record, pp. 4, 7), but the Court of Claims held that this contention was a "fundamental" and "essential error" (Transcript of Record, pp. 11, 12). This question, it is submitted, is the principal issue upon this appeal.

Whatever may have been the legal position of the parties by reason of the two letters quoted, the Appellants paid for the linen in accordance with their offer, received it, and it was not of first quality. The Court of Claims did not find it "necessary to incorporate in the findings" the result of

"the various inspections which were made of the goods after being complained of by the plaintiffs as to their quality" (Transcript of Record, p. 11), but it is submitted that the defective quality of the goods clearly appears from Finding VIII, Transcript of Record, page 10, in which it "appears that the linen as a whole was not of first quality". The previous investigations of the Judge Advocate General and the Comptroller General justify a similar conclusion (Transcript of Record, pp. 4, 6).

At the time of this transaction linen known to the trade as "seconds" was worth about 25% less than "firsts" (Finding X, Transcript of Record, p. 10).

Originally the Appellants filed their claim with the War Department. The Judge Advocate General, although holding the Appellants had been damaged and were entitled to recover therefor, advised that their claim was "unliquidated in amount" and that the "administrative officers of the War Department" were therefore "without authority to entertain or adjust it" (Transcript of Record, p. 7).

The claim was then put before the Comptroller General, in accordance with the statement in the Judge Advocate General's opinion that such claims were "cognizable by the proper accounting officers of the Treasury Department or as legal actions in the Court of Claims". The Comptroller General agreed with the Judge Advocate General that the Government had not been relieved of its liability to furnish goods in accordance with the Appellants' offer and the Government's acceptance, but held that no funds were available out of which the claim could be paid.

The Appellants thereupon instituted their action in the Court of Claims, with the result hereinabove stated. The case is reported in 60 C. Cls. R., p. 255.

Specification of Errors.

1. It is submitted that the Court of Claims erred in the conclusion of law that, upon the facts found, as matter of law the Appellants were not entitled to recover (Transcript of Record, p. 11).

2. It is submitted that the Court of Claims erred in holding that the Appellants' offer of February 2, 1920, was not accepted by the War Department's letter of February 10, 1920 (Transcript of Record, pp. 11, 12).

3. It is submitted that the Court of Claims erred in holding that the offer of February 2, 1920, and the award of February 10, 1920, in reply, did not constitute a contract.

4. It is submitted that the Court of Claims erred in holding that after receipt of the letter of February 10, 1920, the Appellants were "at liberty to decline to proceed further with the transaction", when, as appears from the letter itself (Finding VI, Transcript of Record, p. 9), they had then already paid 10% of the purchase price and payment of the "balance due" amounting to $125,884.80 was demanded by the United States.

5. It is submitted that the Court of Claims erred in dismissing the Appellants' Petition and in giving judgment against them and in favor of the United States (Transcript of Record, p. 11).

ARGUMENT IN BEHALF OF APPELLANTS.

POINT I.

The letter of the Appellants of February 2, 1920, containing their offer to purchase the linen in question, and the letter of the War Department of February 10, 1920, created a contract, whereby the United States agreed to sell and the Appellants to buy linen of first quality and according to sample.

A.

The Appellants' letter of February 2, 1920, was an offer to purchase goods of designated quality.

The Appellants' letter of February 2, 1920, read as follows:

> "I herewith submit my firm offer for approximately 168,400 yards 38-inch Grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93¢ per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts.
>
> This offer is for immediate acceptance on usual Government terms."
>
> *Transcript of Record*, pp. 2, 5, 9.

There is no question that this letter was an offer to purchase on the terms stated. The Court below so treated it, but apparently meant to suggest that it had some legal connection with the previous advertisement of the goods for sale on other and different terms. The reasons for the Appellants' departure from the terms of offer invited by the

previous advertisements do not appear within the Record before this Court, but it is not suggested in the Findings or in the opinion of the Court below, or indeed anywhere in the Record, that the Appellants were not entirely within their rights in submitting a bid upon their own terms and departing from the terms invited by the advertisements mentioned by the Court. It may be inferred from the Findings that the Appellants' offer was the highest received for the goods, and in determining upon the amount of it the Appellants, it is fair to assume, kept in mind that they were bidding for goods warranted as to quality and not for unwarranted goods for the quality of which no responsibility would be undertaken by the seller.

B.

The letter of the War Department, February 10, 1920, was an acceptance of the Appellants' offer.

The first paragraph of the opinion of the Court below correctly states that "the award was no doubt made in response to plaintiffs' bid".

The Court below also said: "The form of the bid and award are material" and referred to Findings V and VI (Transcript of Record, pp. 8, 9).

The award, that is the War Department's letter of February 10, 1920 (Finding VI, Transcript of Record, p. 9), read as follows:

> "1. This is to advise you that Washington has awarded you 150,400 yards of 38" grade 'A' Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955 item 1—65,400 yards, and sheet No. 2879 item 6, 85,000 yards.
>
> 2. Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office Certified Check for $125,884.80 to cover the balance due together with your shipping instructions.

3. This check should be drawn in favor of 'Disbursing Officer, Air Service,' marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

Transcript of Record, pp. 2, 6, 9.

Of this letter the Court below said:

"The essential error is in assuming that there was an acceptance of plaintiff's bid. In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word 'accepted' or any word of similar import used, or any reference to plaintiff's bid. This communication notified plaintiff of the award to it of a quantity of linen, which might or might not comply with the stipulation as to quality contained in plaintiff's bid, and can not by any possibility be construed as an acceptance upon the condition attempted to be imposed that the goods were to be firsts."

Transcript of Record, page 12.

An examination of the Court's opinion, taken with its Findings of Fact, clearly shows that the Court regarded the letter of February 10 from the War Department as a rejection of the Appellants' offer of February 2, or as a counter-offer.

The principal question raised by this appeal is whether the letter of February 10 can properly be so regarded.

The attention of this Court is respectfully invited to the following particulars as bearing upon the determination of this question:

1. The letter of February 10 was written five days after February 5, the date on which bidders under the advertisement were to be notified of awards to them (Finding IV, Transcript of Record, p. 8). This, it is submitted, is an

entirely immaterial consideration, but it may be considered to have some bearing on the apparent suggestion of the Court below that the letter of February 10 was in some way connected with the advertisements. Regardless of the advertisements the Appellants had the right to make any offer they pleased and the War Department could accept or reject it.

2. In the letter of February 10 the War Department stated that the linen "had been awarded" to plaintiffs. As the Court below stated in its opinion (Transcript of Record, p. 11), "the award was no doubt made in response to plaintiff's bid". If "made in response" to the Appellants' bid, how could it be made on terms other than the terms of the bid? The Transcript of Record shows no other offer from the Appellants to the United States to purchase the linen, or any part of it.

3. The letter of February 10 acknowledged receipt of $13,987.30 against the purchase price, which apparently the United States proposed to retain, and requested payment of $125,884.80, "the balance due". If a balance was due, it must have been due pursuant to a contract, and the only inquiry on this point will be, what were the terms of the *consensus ad idem?* If these terms do not appear from the only two letters between the vendor and vendee prior to payment of the purchase price and delivery of the goods where are they to be found?

In the case of *In re Goorman*, 283 Fed. 119, at 123, the Court in construing the phrase "due and payable" said:

> "This indicates a previous transfer to vendee of property for which such entire sum is so payable."

It is equally in point to observe that the letter of February 10 does not offer to return to the Appellants their payment of $13,987.30, nor does it suggest the possibility of such return.

4. The letter of February 10 requested "shipping instructions". This request is a further indication of the assumption on the part of the War Department of two contractual obligations, one on the part of the Appellants to pay the "balance due", and the other on the part of the United States to deliver the goods sold.

5. The fact that the United States, at the time the letter of February 10 was written, had received and apparently then proposed to retain the $13,987.30 paid by the Appellants should, it is submitted, be sufficient to dispose of the argument of the Court below that the plaintiffs were then "at liberty to decline to proceed further with the transaction" (Transcript of Record, p. 12). There is nothing in the Transcript of Record to indicate that, had the plaintiffs so declined, the United States would have been precluded from retaining the $13,987.30 paid and bringing a well-founded action to recover "the balance due", upon tender of delivery.

6. The letter of February 10 does not purport to vary the terms of the Appellants' offer of February 2, and even if the Appellants had declined to proceed with the transaction, as the Court below suggested they had a right to do, there is nothing in the letter of February 10 that could possibly have estopped the United States from claiming that the letter of February 10 was an acceptance of the Appellants' offer and created a contract.

C.

The Secretary of War was authorized to sell the linen in question "upon such terms as may be deemed best".

The Act of Congress of July 11, 1919, the Army Appropriation Act for the fiscal year ending June 30, 1920, provided that the Secretary of War was authorized to sell "surplus property" "upon such terms as may be deemed best". The pertinent provision of the Act, in force at the time of this transaction, reads as follows:

> "In addition to the delivery of the property heretofore authorized to be delivered to the Public Health Service, the Department of Agriculture and the Post Office Department of the Government, the Secretary of War be, and he is hereby, authorized to sell any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any state or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best."
>
> 41 Stat. L. 165, U. S. Comp. Stat., 1923 Supplement, Sec. 6941c.

Apparently this section of the Act of July 11, 1919, has not been cited by this Court except in the case of *Erie Coal & Coke Corporation* v. *United States*, 266 U. S. 518, where it was considered in another connection.

Neither the Judge Advocate General nor the Comptroller General, whose opinions appear in the Transcript of Record at pages 5 and 3, respectively, indicated any doubt as to the legality of the acceptance of the Appellants' offer, and no reference would be made to the point here except for the statement in the opinion of the Court below (Transcript of Record, p. 12) that "while it is not necessary to decide the question, it may be suggested that it probably was the only sort of an award authorized", meaning an award under the published advertisements.

D.

The inspections of the linen after Appellants' complaint of the quality show recognition of an obligation in this respect.

Finding VIII of the Court below (Transcript of Record, p. 10) refers to "several detailed inspections of the materials by experts representing both parties". The subject of these inspections was also touched upon in the opinion of the Court below as follows:

> "There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis."
>
> *Transcript of Record*, p. 11.

The Judge Advocate General referred to one inspection of a part of the goods by the War Department as follows:

> "It appears, however, that the Air Service has caused an inspection of the remaining unbleached fabric by an expert fabric inspector who found that the linen while bought by the Government as Grade 'A' or 'firsts' quality was not in fact first quality".
>
> *Transcript of Record*, p. 6.

If the goods were sold without obligation or warranty respecting quality, it is difficult to see the purpose of the War Department in arranging, with the Appellants, these inspections by experts representing both the Government and the Appellants. Certainly where the vendee claimed a breach of warranty as to quality, the vendor could not be reasonably expected to participate in an expert determination of the question whether there had been a breach without disclaiming any responsibility as to quality, if in fact no such responsibility had been assumed.

E.

The Appellants' construction of the letters of February 2 and February 10 is in accord with the conclusions of the Judge Advocate General of the War Department and the Comptroller General.

Of course it is not intended to be suggested that the opinions of the Judge Advocate General and Comptroller General were binding in the slightest degree on the Court of Claims. Nevertheless, these opinions, it is proper to observe, sustained the view of the Appellants that the two letters in question were an offer and acceptance, creating a contract.

The Judge Advocate General said:

> "Although the advertisements of the Government did not describe the offered linen as 'firsts', but on the contrary offered the goods 'as is', expressly disclaiming a guarantee on behalf of the Government, yet the offer of Iselin & Company departed from the terms of the advertisement and was conditioned 'goods to be firsts'. This offer was unconditionally accepted by the Government's representatives and the Government thereby became obligated to deliver goods of the quality so defined, regardless of the conditions of the prior advertisement."
>
> *Transcript of Record*, pp. 6-7.

The Comptroller General said:

> "As the bid submitted was accepted unconditionally I think there can be no doubt that the Government obligated itself to furnish linen in accordance with the specifications and description given by the claimant in its bid."
>
> *Transcript of Record*, p. 4.

Moreover, the opinion of the Judge Advocate General is important in showing the construction of the terms of sale by the War Department.

F.

General rules of interpretation require the letter of February 10 to be construed, if construction be required, against the United States rather than against the Appellants, and any doubt as to its meaning should be resolved in favor of the Appellants.

Among the general rules of interpretation that may be considered in this connection are the following:

1. "The rule that a contract is to be construed most strongly against the party preparing it applies to the government in a case like this, as well as to an individual. *Garrison* v. *United States*, 7 Wall. 688, 690, 19 L. Ed. 277; *United States* v. *Newport News Shipbuilding & D. D. Co.*, 178 Fed. 194, 200, 101 C. C. A. 514; *Simpson* v. *United States*, 31 Ct. Cl. 217, 243."

Farrington, D. J., Scully v. *United States*, 197 Fed. 327, at p. 343, (1912).

In *Garrison* v. *United States* (1868), *supra*, this Court reversed the decision of the Court of Claims in the same case (2 C. Cls. R. 382) and reestablished the rule of interpretation above quoted. The summary of the argument in behalf of the claimant in the lower Court in that case reads in part as follows:

> "12. It is about time that the sacredness of contracts fairly made be vindicated, and even high public functionaries should understand (whatever their individual morality may be) that the public faith and credit cannot be capriciously trifled with" (2 C. Cls. R. at p. 383).

The Court of Claims, in unanimously dismissing the petition in Garrison's case, found that the claimant had been overpaid $1,600 or $17,800, depending upon alternative constructions of the contract.

On appeal this Court unanimously reversed the Court of Claims, "with instructions to the court below to enter a judgment for the plaintiff" for $22,400.

2. In determining the terms of a contract entered into by correspondence, a letter must be construed strictly against the party writing it.

Language used by District Judge A. N. Hand in another case would seem to be applicable:

> "The question is what the plaintiff was reasonably justified in supposing, and not what the defendant actually intended by the correspondence."
>
> *Pope* v. *Bibb*, 290 Fed. 581 at 583 (1921), *affirmed* 290 Fed. 586.

See also

13 *Corpus Juris*, 283.

The fact that the letter of February 10 was silent as to the conditions in the Appellants' offer of February 2 is sufficient, having regard to all the circumstances set out, to show acceptance of the conditions.

United States v. *Newport News Shipbuilding Co.*, 178 Fed. 194 (1910). In this case the Circuit Court of Appeals of the Fourth Circuit quoted (at p. 202) from the opinion of the Court of Claims in *Central Pacific Railway Company* v. *United States*, 28 C. Cls. R. 427, the following:

> "A construction given to a contract by the express declaration of one party, and the silent acquiescence of the other prior to or during the service of the performance, cannot be repudiated after the party has acted upon the faith of it."

POINT II.

The cases cited and apparently relied upon by the Court of Claims in holding the letter of February 10, 1920, not to be an acceptance of the Appellants' offer do not sustain the position of the Court.

Only two cases, both decisions of this Court, are cited in the opinion of the Court of Claims herein. They are cited at page 12 of the Transcript of Record, apparently for the proposition that "A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modifications suggested." This language is quoted by the Court below from the opinion of this Court in *Minneapolis, etc. Ry.* v. *Columbus Rolling Mill*, 119 U. S. 149, at p. 151, and may also be found in substance in this Court's opinion in *National Bank* v. *Hall*, 101 U. S. 43, at p. 50.

Before dealing with the two cases cited it should be observed that the undoubted principle stated by the Court of Claims has no application to the facts of the case now on appeal. The War Department's letter of February 10 was not "a proposal to accept, or an acceptance upon terms varying from those offered" by the Appellants in their letter of February 2. The following language from the opinion of the Court below may explain what was in the mind of that Court in the apparent treatment of the letter of February 10 as a rejection of the Appellants' offer:

> "In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word 'accepted' or any word of similar import used, or any reference to plaintiff's bid."

It is submitted that this language indicates a misapprehension of the law of contracts. The important fact to be observed is not that the letter of February 10 contains no such word as "accepted" but that it does not contain a single word indicating a variation from the terms of the Appellants' letter of February 2.

However, the two cases in question, having been cited by the Court of Claims herein, will be considered in sufficient detail to distinguish them from the case before the Court on this appeal.

A. *Minneapolis & St. Louis R. R.* v. *Columbus Rolling Mill*, 119 U. S. 149 (1886):

It appeared in this case that an offer was made for the sale of "2,000 to 5,000" tons of rails. The attempted acceptance was for 1,200 tons. Obviously the order for 1,200 tons was for a quantity not within the limits of the offer, and it was held not to be an acceptance of the offer. The attempted acceptance being entirely outside the maximum and minimum limits of the offer, no further comment would seem to be required to distinguish the case from the present appeal.

B. *National Bank* v. *Hall*, 101 U. S. 43 (1879):

Obvious grounds for distinguishing this case from the case on the present appeal appear from the syllabus, 101 U. S. 43, which reads as follows:

> "A., B., & Co., a firm engaged in selling live-stock on commission, authorized a bank to cash drafts drawn on the firm by C., their agent, who forwarded live-stock to them. Some controversy arising, A., B., & Co. wrote to the bank as follows:
>
> 'Jan. 15, 1876.
>
> 'Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so

as to meet dr'ft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to C.'

The cashier of the bank replied as follows:

'Jan. 17, 1876.

'Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to C. on stock to come in. Have always supposed it was in transit. After this we shall require ship'g bill.'

There was no further communication on this subject between the parties. Two clerks of A., B., & Co. who were aware of this correspondence became partners without the knowledge of the bank, and the business was thereafter carried on in the same name. C. continued to draw on the firm as before, and the bank, without requiring bills of lading, to cash the drafts, all of which were accepted and paid by the firm. The bank acted in good faith. C. absconded with the proceeds of two drafts, and the firm brought this action against the bank to recover the amount. *Held*, 1. That the letters constitute no contract, and the bank is not responsible to the firm for cashing the drafts without bills of lading attached. 2. That if, however, a contract did arise from the cashier's unanswered letter of Jan. 17, 1876, it was with the then existing firm, and ceased on the subsequent change thereof by the admission of new members, without the knowledge or the consent of the bank."

If Hall & Co. had declined to accept the drafts when presented by the bank, a very different situation would have been presented, although not one to affect the construction of Hall & Co.'s notice to the bank and the bank's acknowledgment. The effect of this notice and the bank's acknowledgment were stated by this Court in the following language:

"The defendants-in-error notified the bank that thereafter they would accept only on the conditions specified. The cashier answered, that the bank would protect itself. This is the sole effect of the letters" (101 U. S. 43, at p. 49).

POINT III.

It appears from the transcript of record that the linen delivered to the Appellants was not of "first" quality as required by the contract.

References to the quality of the goods in the Transcript of Record are very few, in consequence of the view of the Court below that no contract had been entered into. Explanation of the absence of detailed finding on this aspect of the case appear in the following language in the opinion of the Court:

> "There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis."
>
> *Transcript of Record*, p. 11.

Again in the last paragraph of its opinion the Court said:

> "For the reasons stated and apparently without necessity of going further into the details of the transaction we have concluded that plaintiff is not entitled to recover and have directed judgment according."

However, careful consideration of Findings VIII and IX clearly shows that the linen in question "as a whole was not of first quality". Finding VIII (Transcript of Record, p. 10) reads in part:

> "By reason of this rejection upon the ground that the linen was not of first quality, complaint was made by the plaintiff to the Material Disposal and Salvage Division, as a result of which there were several detailed inspections of the materials by experts representing both parties. The defects discovered were of a minor character but they were such as to warrant the conclusion that the linen as a whole was not of first quality. It does not appear that it was not grade A."

This is to be considered in connection with Finding IX, which is as follows:

> "The term 'grade A' is a term of construction. The term 'firsts' and 'seconds' are terms of quality. The term 'grade A' was used in the trade, entirely separate and apart from the designation of quality as indicated by the terms 'firsts' and 'seconds', and if the construction of a fabric was such as to entitle it to the designation 'grade A' it was grade A, irrespective of quality."

So far as appears from the Findings of Fact, the linen may have been even below the grade of "seconds", but the only two grades of quality referred to in the Findings of Fact are "firsts" and "seconds".

POINT IV.

The measure of damage for breach of warranty of quality in a contract to sell goods is the difference between the value of the goods delivered and the goods of the warranted description and in the present case this amounts to more than the sum claimed as damages.

The general rule on this subject has been stated as follows:

> "The general measure of damage for breach of warranty of quality is the difference between the value of the article actually furnished the buyer and the value the article would have had if having the qualities which it was warranted to have. Whether the action is in tort or contract is immaterial."
>
> *Williston on Sales*, Second Edition, Sec. 613, pp. 1537-1538, and cases cited.
>
> *Florence Oil & Ref. Co.* v. *Farrar, et al.*, 119 Fed. 150 (C. C. A., Eighth Circuit, 1902).

In the present case the reasonable value of the goods of the warranted description, it is submitted, should be considered fixed at the price paid by the Appellants, namely, $134,141.60. (Finding VII, Transcript of Record, p. 10.)

The purchase price is the *prima facie* evidence of the value of the goods as warranted in the absence of other evidence.

Smeltzer v. *White*, 92 U. S. 390, at p. 395 (1875).

South Covington & C. S. Ry. Co. v. *Gest*, 34 Fed. 628 at 645 (1888).

Vaupel v. *Lamply*, 103 N. E. 796, 181 Indiana, 8 (1914).

Burgess v. *Felix*, 140 Pac. 1180, 42 Oklahoma, 193 (1914).

Denver Horse Importing Co. v. *Schafer*, 147 Pac. 367, 58 Col. 376 (1915).

In *Denver Horse Importing Co.* v. *Schafer*, *supra*, the Court said:

> "Where there is no other evidence of the real value of the article than the contract price, that is presumed to be the real value, *Seigworth* v. *Leffel*, 76 Pa. 476. The rule in *Seigworth* v. *Leffel*, *supra*, that the contract price is sufficient evidence of the value for the purpose for which the article was sold, is sustained in *Smeltzer* v. *White*, 92 U. S. 390, 23 L. Ed. 508".

As regards the difference in value between linen designated as "firsts" and linen designated as "seconds", the Court below found

> "At the time of this transaction linen of the quality designated as 'seconds' was worth, in the trade, approximately 25% less than 'firsts' ".
>
> Finding X, Transcript of Record, p. 10.

As the linen delivered was "seconds" or, so far as appears from the Findings of Fact, of poorer quality than "seconds", it was worth "25% less than 'firsts', which the Appellants

had specified, that is to say $33,536.15 *less* than the purchase price they had paid. It is submitted that this sum, $33,536.15, is the amount of the damage suffered by the Appellants as shown by the Findings of Fact. However, this amount is in excess of the damage claimed in the Appellants' Petition in the Court of Claims, in the fifth paragraph of which their damage was stated at $30,000, and the recovery of the Appellants is therefore limited to this amount.

POINT V.

The judgment appealed from should be reversed and judgment should be directed and entered in favor of the Appellants for damages in the sum alleged in the petition, namely, thirty thousand dollars ($30,000).

The Findings and Opinion of the Court below show beyond any possible doubt that the Appellants offered to buy, and thought they were to receive, only linen of first quality (Transcript of Record, pp. 9, 11-12); that in accordance with their offer they paid to the United States $134,144.60; and that the goods delivered to them were not of first quality (Transcript of Record, p. 10), but were worth 25%, or $33,536.15 less than goods of first quality (Transcript of Record, p. 10), by which amount, it follows, the Government was unjustly enriched. The facts as found show a payment for something that was never received, to wit, linen of first quality.

The attention of this Court is also invited to the omission of the Court below to make any Finding of Fact as to whether the linen delivered to the Appellants complied with

their offer in respect of other stipulations in their letter of February 2, such as the descriptive term "natural brown" and the stated average length of pieces (Transcript of Record, p. 9); and further to the omission of the Court below to make any Finding of Fact explaining the payment of $13,987.20 (Finding VI, Transcript of Record, p. 9).

Respectfully submitted,

DALLAS S. TOWNSEND,
Attorney for Appellants

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 291

WILLIAM E. ISELIN, JAMES W. CROMWELL, LINCOLN Cromwell, et al., etc., Appellants

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

FINDINGS OF FACT AND OPINION BELOW

The findings of fact and the opinion of the Court of Claims (R. 7–12) are reported in 60 C. Cls. 255.

JURISDICTION

The judgment below was entered January 26, 1925. (R. 13.) An application for appeal was filed February 5, 1925, and allowed February 9, 1925 (R. 13), under authority of Section 242 of the Judicial Code, which was then in force.

STATEMENT OF THE CASE

Appellants sue to recover damages in the sum of $30,000 for the breach of an alleged express warranty of quality of certain surplus airplane linen sold them by the Government. (R. 1–3.)

The Court of Claims found that in January, 1920, the Materials Disposal and Salvage Division of the Office of the Director of Air Service of the Army was in possession of a considerable quantity of surplus airplane linen which it desired to sell. (Finding II, R. 8.) It advertised this linen for sale on January 15, 1920, in two items of 68,400 yards and 100,000 yards, in various publications in New York City and elsewhere, and invited bids. (Finding IV, R. 8.) Other surplus materials were also covered by the same advertisement.

This advertisement described the linen as "Grade A," and stated "that the materials would be sold '*as is*' at point of storage; *that inspection is invited* and that 'specifications and quantities on hand are based upon the best information available, *but no guaranty on the part of the Government is given.*'" (Italics ours.)

The advertisement further provided "that bids might be made for 1,000 yards or multiples thereof, or for any entire lot; that bids would be received until three o'clock a. m. (sic.), February 2, 1920; that the bidders would be notified on or before February 5 of the yardage awarded, upon receipt of which notification they would be required to for-

ward a check or draft for 10 per cent of the purchase price;" and that " all materials (were) to be removed and paid for within 30 days." (Finding IV, R. 8.)

The above advertisement came to the attention of one McDowell, a representative of the appellants, who are members of a partnership " engaged in the business of handling fabrics " (R. 7, 11, 12), and on their behalf he submitted the following bid (Finding V, R. 9):

NEW YORK, *Feb. 2d, 1920.*

MATERIALS DISPOSAL & SALVAGE DIVISION,
OFFICE OF THE DIRECTOR OF AIR SERVICE,
Building B, Sixth and B Sts. N. W.,
Washington, D. C.

GENTLEMEN: I herewith submit my firm offer for approximately 168,400 yards of 38-inch grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filling, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. *Said linen as per sample submitted; goods to be firsts.*

This offer is for immediate acceptance on usual Government terms.

Yours very truly,

E. I. McDOWELL.

(Italics ours.)

It will be noted that the above bid contains the clause that the linen should be " as per sample sub-

mitted." Attention is invited in this connection to Findings III and V of the Court of Claims. (R. 8, 9.) As appellants do not rely for recovery upon this clause of their bid, it would only tend to becloud the real issue in this case to say more at this point than that the findings do not show that "samples" of the linen were ever exhibited to appellants by any authorized agent of the Government; that appellants do not contend that the present sale was one by sample; and that they do not deny that the above bid, which was the only one ever made directly to the Government, was submitted in response to the published advertisement.

Appellants' case is predicated entirely upon the hypothesis that the condition in their bid that the goods should be "firsts" was agreed to by the Government in the following letter (hereinafter, for convenience, called the award), which was sent them by the Materials Disposal and Salvage Division after the various bids had been opened and considered (Finding VI, R. 9–10):

> WAR DEPARTMENT, AIR SERVICE,
> MATERIALS DISPOSAL & SALVAGE DIVISION,
> *New York District Office,*
> *February 10, 1920.*
>
> From: Air Service, Materials Disposal and Salvage Division, N. Y. District.
> To: E. I. McDowell, 20 Thomas St., N. Y. C.
> Subject: Sale No. 2545.
>
> 1. This is to advise you that Washington has awarded you 150,400 yards of 38"

grade "A" Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955, item 1—65,400 yards, and sheet No. 2879, item 6—85,000 yards.

2. Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office certified check for $125,884.80 to cover the balance due, together with your shipping directions.

3. This check should be drawn in favor of " Disbursing Officer, Air Service," marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award.

ROBERT COKER, *Capt., A. S. A.,*
District Manager M. D. & S. Division, by F. W. Weeks, Frank W. Weeks, Sales Manager.

" It does not appear that there was any acceptance of plaintiff's (appellants') bid otherwise than as embodied in the communication last above quoted." (Finding VI, R. 10.)

The court below has found that in the nomenclature of the linen trade " the term ' grade A' is a term of construction," whereas " the terms 'firsts' and 'seconds' are terms of quality," and that " the term ' grade A' was used in the trade, entirely separate and apart from the designation of quality

as indicated by the terms 'firsts' and 'seconds,' and if the construction of a fabric was such as to entitle it to the designation 'grade A' it was grade A, irrespective of quality." (Finding IX, R. 10.)

Deliveries of the linen were made to appellants at various times after the award, and payment therefor made at the bid price of 93 cents per yard. (Finding VII, R. 10.) No protest against the quality of the linen was made at the time of these deliveries. (R. 10.)

As the deliveries were short of the stipulated quantity, a proportionate repayment was made to appellants for the shortage, leaving the aggregate amount paid by them for the linen $134,144.60. (Finding VII, R. 10.)

About May, 1920, appellants resold thirty thousand yards of the linen for delivery in June, the linen to be bleached and delivered in that condition at $1.60 per yard. The purchaser, however, rejected the linen upon delivery on the ground that because of defects therein it was not first quality. By agreement, another thirty thousand yards selected from the entire lot was, after bleaching, substituted for the rejected material. The purchaser maintained that this lot was likewise not of first quality, *but the appellants contended that "it was in fact of that quality."* (Finding VIII, R. 10.)

Complaint was then made by the appellants to the Materials Disposal and Salvage Division, with the result that several detailed inspections of the

material were made by experts representing both parties. While the defects discovered were of a minor character, they were such as to warrant the conclusion that the linen as a whole was not of first quality. It did not appear, however, that it was not grade A. (Finding VIII, R. 10.)

(Whether the appellants inspected the linen before bidding, as the advertisement invited, the record does not disclose.)

" Seconds," the court has found, were worth in the linen trade approximately 25 per cent less than " firsts " at the time of the sale to appellants. " It does not appear from the record," however, " at what price or prices the plaintiff (appellants) sold this linen or what actual loss, if any, it sustained in connection with the purchase and sale thereof." (Finding X, R. 10, 11.)

The Court of Claims dismissed appellants' petition, holding that the Government in the award did not agree to the stipulation as to quality contained in appellants' bid, and that there was therefore a fatal variance between the bid and award which prevented the two from constituting a contract.

SUMMARY OF ARGUMENT

I. The published advertisement offered the goods for sale " as is," with inspection invited, and with " no guaranty." Appellants inserted in their bid the condition that the goods should be of first quality and " per sample submitted." There is nothing in the award indicating acquiescence in this condi-

tion by the Government. No doubt the appellants knew, as any reasonable person should have known, that when the award was made, the Government was ignoring the references in the bid to " sample submitted " and to " firsts " and intended to sell in accordance with the advertisement. As the bid and award were therefore not in accord with respect to the matter of warranting the quality of the goods, the award, under a well-settled principle of the law of contracts, constituted nothing more than a mere counter-offer by the Government, or a reiteration of its advertised offer, to sell without warranty. This counter-offer was accepted by appellants by completing payment of the bid price and taking full delivery of the goods.

II. The legal effect of the letter of award as a mere counter-offer was not affected by the fact that the Government acknowledged therein the receipt of a portion of the bid price and requested appellants to transmit the balance, together with shipping instructions. This counter-offer was accepted by appellants.

III. Collaboration by the United States with appellants in investigation of the latter's complaint as to the quality of the goods was not inconsistent with a sale without warranty of quality.

IV. Appellants admit that the opinions of the Acting Judge Advocate General and the Comptroller General upon which they so strongly rely have no binding force. Whatever persuasive effect

these opinions might have had is destroyed by the admission of these officers of lack of authority to entertain and adjudicate appellants' claim, and by patent differences between the facts upon which their opinions were based and those found by the Court of Claims.

ARGUMENT

I

THE UNITED STATES SOLD THE LINEN WITHOUT WARRANTY OF QUALITY

The question presented for decision is whether the United States in selling the surplus linen involved herein agreed to warrant the quality thereof. The linen, which was admittedly "left over from the war" (Appellants' brief, p. 2), was sold under authority of the Army Appropriation Act of July 11, 1919, c. 8, 41 Stat. 104, 105. That Act empowered the Secretary of War to sell surplus war supplies upon such terms as may be deemed best. (See *Erie Coal Co.* v. *United States,* 266 U. S. 518, 521.)

In *Merriam* v. *United States,* 107 U. S. 437, 441, 442, a case arising, like the present one, in the Court of Claims, this Court said:

> It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when

the contract was made. *Nash* v. *Towne,* 5 Wall. 689; *Barreda* v. *Silsbee,* 21 How. 146, 161; *Shore* v. *Wilson,* 9 Cl. & Fin. 355, 555; *McDonald* v. *Longbottom,* 1 El. & El. 977; *Munford* v. *Gething,* 29 L. J. C. P. 110; *Carr* v. *Montefiore,* 5 B. & S. 407; *Brawley* v. *United States,* 96 U. S. 168.

Let us consider then, briefly, the circumstances under which the Government sold its surplus war supplies. These circumstances were generally known to every one at the time, and the Court may take judicial notice of them. (*United States* v. *Hamburg-American Co.,* 239 U. S. 466; *Wallace* v. *United States,* 257 U. S. 541, 546; *Ransome Concrete Machinery Co.* v. *Moody,* 282 Fed. 29, 33, 35.)

It is a matter of common knowledge that the Government's need for supplies of almost every kind was so great during the War that in many instances it had to take what it could get and could not insist upon a rigid compliance with its peace-time specifications. Furthermore, supplies had to be purchased in such large quantities and in so short a period of time that it was usually impossible for the Government to subject materials to more than a cursory and casual inspection. In most instances the Government had to rely upon the good faith and integrity of the persons with whom it dealt. In this manner it accumulated during the War huge stocks of all kinds of materials, and after the Armistice there were stored in warehouses throughout the country surplus supplies which, it

has been estimated, cost about five billions of dollars. Due to the pressure under which these supplies were purchased, not only had there generally been no careful inspection of them to determine that they conformed to specifications, but there were even no accurate records of the quantities on hand or of their location.

When the Government began to sell its surplus property the Army had largely demobilized, and generally the officers charged with the duty of selling such property were not the same officers who had purchased it, and they rarely had personal knowledge of the character, condition, or quantity of the property which they offered for sale. Furthermore, it was then generally too late for the Government to assert claims for breach of warranty against the contractors who had supplied it, since the time within which such contractors were entitled to be notified of any breach of warranty had long passed. (Cf. *Reading Co.* v. *United States,* 268 U. S. 186.) In fact, it was often unknown from whom given supplies had been purchased. There was also doubt whether the officers selling surplus property had authority to warrant it (*Bennett* v. *United States,* 6 Ct. Cls. 103), even if they had been justified in doing so on the basis of the information they had with regard to it.

The Government was therefore forced to adopt, and did adopt, the policy of selling its surplus property without warranty. The adoption of a differ-

ent policy would have been reckless beyond measure and would have subjected the Government to numerous claims for breach of warranty when the Government itself could no longer assert such claims against its own vendors. The most that the agents of the Government could be expected to do, and all that they did attempt to do, was to give to purchasers in good faith whatever information they had with respect to the property offered for sale. In doing this, however, they uniformly accompanied the description of the property with some warning indicative of a purpose not to warrant. (See, for example, *Lipshitz & Cohen* v. *United States,* 269 U. S. 90; *Mottram* v. *United States,* decided by this Court April 12, 1926.) In other words, purchasers were to assume the risk that the property would meet expectations. Of course, by selling on such a basis the officers realized much less than they could have obtained for the supplies had the purchasers been given a warranty, but under the circumstances the policy adopted was the only safe one to pursue.

In line with such a policy the Government provided in the advertisement for bids in this case that the linen " would be sold ' as is ' at point of storage " (R. 8). Appellants admit that this provision contemplated a sale without warranty of quality. (Brief, p. 2.) Coupling it with the further provisions of the advertisement " that inspection is invited and that ' specifications and quanti-

ties on hand are based upon the best information available, but no guaranty on the part of the Government is given ' " (R. 8), it is obvious that the Government was offering the goods for sale without warranty of any kind.

In response to this advertisement appellants submitted a bid in which they inserted the condition that the goods should be "firsts." And they claim that this condition was agreed to by the Government in the award, which is set out in full at pages 4–5 hereof.

There is not a word in the award that can be construed as expressive of a purpose on the part of the Government to abandon its previously announced plan of selling the linen without warranty. As the Court of Claims pointed out (R. 12):

> In the communication of February 10 informing the plaintiff that it had been awarded a stated number of yards of grade A airplane linen we do not find the word "accepted" or any word of similar import used, or any reference to plaintiff's bid. This communication notified plaintiff of the award to it of a quantity of linen, which might or might not comply with the stipulation as to quality contained in plaintiff's bid, and cannot by any possibility be construed as an acceptance upon the condition attempted to be imposed that the goods were to be firsts.

The award was manifestly intended to be strictly in accord with the terms and conditions of sale set

out in the published advertisement. The bid and award were therefore plainly at variance on the question of warranting the quality of the goods, and the case falls squarely within the well-established principle of law stated in *Minneapolis & St. Louis Railway* v. *Columbus Rolling Mill,* 119 U. S. 149, 151, that "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested." The award was nothing more than a mere counter-offer by the United States, a reiteration of its advertised offer, to sell the linen without warranty (See *Beaumont* v. *Prieto,* 249 U. S. 554, 556), and upon its receipt appellants, if they were not satisfied, should have taken steps to reject it. Instead of doing so, however, they accepted the counter-offer by completing payment of the bid price and taking full delivery of the goods. (R. 9–10.)

In view of the advertised offer, the terms of which were known to the appellants, in which the United States had declared that the linen would be sold without warranty, the form of the notice of award did not justify a belief by appellants that the United States had decided to completely reverse its declared policy to sell without warranty.

On the face of the advertisement, bid and award, it is, and then was, evident, to any reasonable per-

son, that in making the award the United States was ignoring the statement in the bid that the goods were to be " as per sample submitted " and to be " firsts," and intended to carry out the advertised sale. If, as contended by appellants, the award was an acceptance of the bid as made, it was a sale " as per sample submitted " as well as of firsts, and yet this theory will not work because no sample was ever submitted by any authorized agent of the Government; and if the award is thus treated as ignoring the reference in the bid to a sample, there is no reason to claim the reference to " firsts " was not ignored also.

It is evident there was no meeting of the minds on a sale with a warranty of quality. The minds of the parties first met when the appellants acquiesced in an award made without reference to quality, and evidently intended to be based on the advertisement, and sent in a check for the balance.

It is significant also that no protest as to the quality of the linen was made at the time the various deliveries thereof were being made. It was not until June, 1920, or later, three months or more after all the linen had been delivered (Findings IV, VI, VII, VIII, R. 8, 10), that any question as to the quality of the linen arose, and it arose then only after a purchaser to whom the appellants had resold a part of the goods, after bleaching, asserted that the goods were not of first quality, although the appellants stoutly maintained that they were of

that quality. Appellants then complained to the Government that the goods were not "firsts." (Finding VIII, R. 10.) This was the first intimation the Government had that appellants intended to claim that the Government had agreed to sell them linen of any particular quality and looks like an afterthought suggested by the objection raised by appellants' vendee.

At the end of appellants' brief (pp. 23–24) we find a vague suggestion that the Government agreed not only to warrant the quality of the linen, but that it agreed to give a warranty in connection with every term appellants used in their bid to describe the material. As the Court of Claims in its findings attempted to do no more than give fragmentary extracts from the advertisement, it is impossible to tell whether the descriptive terms to which appellants allude were not also employed in the advertisement. If they were, the bid in this respect would obviously stand on the same plane as the advertisement, which expressly provided that " specifications . . . are based upon the best information available, but no guaranty on the part of the Government is given." (R. 8.) In other words, the bid would be an offer to buy without warranty that the goods met the descriptive terms. If, however, the appellants used terms in describing the linen that were not used in the advertisement, the same argument we have made in connection with the condition as to quality they inserted in their bid would apply here.

II

THE LETTER OF AWARD WAS NONE THE LESS A MERE COUNTER-OFFER BECAUSE THE GOVERNMENT ACKNOWLEDGED RECEIPT THEREIN OF A PORTION OF THE BID PRICE AND REQUESTED APPELLANTS TO TRANSMIT THE BALANCE, TOGETHER WITH SHIPPING DIRECTIONS

In the award there appears the following sentence (R. 9):

> (2) Inasmuch as we have your check for $13,987.20 to cover 10% of the sale, it is requested that you send this office certified check for $125,884.80 to cover the balance due, together with your shipping directions.

Appellants insist that this language is inconsistent with any other intent on the part of the Government than to accept their bid, including, of course, its stipulation as to quality. (Brief 10, 11.)

We have seen, however, that the bid and award were not in accord in a material respect, and therefore that the latter, under a well-settled principle of the law of contracts, constituted nothing more than a mere counter-offer on the part of the United States. Considered in this light and not as something isolated and detached from the rest of the transaction, there is nothing incongruous in the insertion of the above language in the award. By it the Government's officers say nothing more to the appellants than that " we have received a sum of money transmitted by you on the assumption that your bid would be accepted without modification;

we have not seen fit, however, to assent to the condition as to quality inserted by you in such bid; if you should nevertheless desire to go ahead with the transaction you should send the balance of the price stipulated in your bid, which is agreeable to us, together with your shipping directions."

Appellants seem to feel that if the United States did not intend to accept their bid unconditionally, they should have offered in the award to return the initial deposit of $13,987.20. (Brief, p. 10.) There was, however, no logical reason why the Government should not have retained the money until appellants indicated whether they desired to accept or reject the proposal advanced by the Government. That this course was justified is evidenced by the fact that the appellants did accept the Government's offer by transmitting the balance of the bid price and taking complete delivery of the goods. (Finding VII, R. 10.)

III

PARTICIPATION BY THE GOVERNMENT IN THE INVESTIGATION OF THE MERITS OF APPELLANTS' COMPLAINT AS TO THE QUALITY OF THE LINEN WAS NOT INCONSISTENT WITH A SALE WITHOUT WARRANTY

Appellants lay stress upon the following finding of the Court of Claims (Finding VIII, R. 10):

> * * * complaint was made by the plaintiff to the Material Disposal and Salvage Division, as a result of which there were several detailed inspections of the materials by experts representing both parties.

They say (Brief, p. 13):

> If the goods were sold without obligation or warranty respecting quality, it is difficult to see the purpose of the War Department in arranging, with the Appellants, these inspections by experts representing both the Government and the Appellants. Certainly where the vendee claimed a breach of warranty as to quality, the vendor could not be reasonably expected to participate in an expert determination of the question whether there had been a breach without disclaiming any responsibility as to quality, if in fact no such responsibility had been assumed.

Far from showing, as appellants have stated, that the inspections were " arranged " by the War Department, the record specifically states that these inspections resulted from the complaint which had been submitted by appellants. The appellants and not the War Department were the prime movers. As a practical matter, however, the officers of the War Department would have been chargeable with delinquency if, in the face of possible legal action against the Government, they had failed to participate with appellants in an investigation into the merits of their complaint, regardless of whether the goods were sold with a warranty of quality or not. Such an investigation might have disclosed that the goods were of the quality which the appellants themselves had theretofore insisted to a third party they were (Finding VIII, R. 10), and thus either have frus-

trated a suit upon the alleged warranty or, at least, have furnished the Government with a complete defense to such an action.

There is no basis in the record for appellants' assertion that the officers of the War Department participated in these investigations "without disclaiming * * * responsibility as to quality," if that be material. The findings are entirely silent upon the matter, and the reason is evident from the following quotation from the trial court's opinion (R. 11):

> There is much in the record as to the various inspections which were made of the goods after being complained of by the plaintiff as to their quality, and the conclusion from such inspections, which we have not found it necessary to incorporate in the findings, since the merits of the case, as we see it, are to be determined upon another basis.

The Court of Claims acted rightly in refusing to enter extensive findings in connection with these investigations. The Government did not contract to deliver goods of any specific quality, and it was therefore immaterial what the subsequent investigations disclosed as to their quality, or whether the Government collaborated with appellants in these investigations with or without an express reservation or disclaimer of responsibility as to quality. The legal effect of the nonacceptance of appellants' bid and its disputed condition can not

be subverted by an act which at most is construable solely as a prudential step undertaken for the protection of the Government's interests.

IV

THE OPINIONS OF THE ACTING JUDGE ADVOCATE GENERAL AND THE COMPTROLLER GENERAL ARE WITHOUT PERSUASIVE VALUE IN THE CONSIDERATION OF THIS CASE

To their petition in the Court of Claims appellants annexed two opinions rendered in connection with their claim by the Comptroller General and the Acting Judge Advocate General of the Army. (R. 3–7). In both opinions these officers express the view that the Government unconditionally accepted appellants' bid and thereby contracted to deliver first quality linen. While appellants now admit that these opinions were not "binding in the slightest degree on the Court of Claims" (Brief, p. 14), and by the same token have no greater weight in this Court, they have nevertheless made repeated references to them in the brief they have filed here.

These opinions were rightly ignored by the Court of Claims in deciding this case. In the first place, both officers admit their lack of authority over the claim here involved. Thus the Acting Judge Advocate General says in his opinion to the "Director of Sales," which was first in point of time (R. 7):

> Such a claim for damages is, of course, unliquidated in amount and therefore the

> administrative officers of the War Department are without authority to entertain or adjust it.

And the Comptroller General in his opinion says (R. 4):

> However, the claim is clearly one for damages resulting from a breach by the Government of the sale contract and there is no appropriation available for the payment of such claims. Therefore, the claim can not be adjudicated by and paid on the certificate of the General Accounting Office, under any appropriation.

It is obvious, therefore, that these officers should have said nothing with reference to the legal effect of the letter of award. All they should have said, under the circumstances, was that they were without power to entertain and adjudicate the claim.

Moreover, there are various patent differences between the facts upon which these officers relied, as recited in their opinions, and those found by the Court of Claims, which facts, of course, are the ones upon which this case must be decided.

To give several illustrations: In the Comptroller General's opinion we read (R. 4):

> It appears that after a *representative of the Air Service* had called on claimant and exhibited a sample of aeroplane linen to be sold by the Government, claimant submitted an offer of 93 cents per yard for approximately 168,400 yards of linen, giving cer-

tain specifications and further stipulating "goods to be firsts."

* * * * *

It is admitted by the Air Service that the advertisement did not come to claimant's notice until after its bid had been submitted and accepted. (Italics ours.)

This is simply another way of saying that the bid involved in this case resulted not from the published advertisement, but from the display of samples made by the alleged Air Service representative.

In the Acting Judge Advocate General's opinion we read (R. 5):

> In January, 1920, *a sales agent of the Government* called upon the firm of William Iselin & Company, exhibited a sample of linen and offered same for sale. This firm *thereupon* through one E. I. McDowell, submitted a bid in the following language: (Here follows the bid involved in this controversy; *supra,* p. 3.) (Italics ours.)

The Acting Judge Advocate General would also seem, therefore, to have been of the view that appellants' bid came into being as the result of the activities of the alleged governmental sales agent.

Here, however, is what the Court of Claims found:

> In January, 1920, two different parties *claiming* to be authorized representatives of the United States in that behalf exhibited samples and solicited bids from the plain-

tiff for the purchasing by it of said linen, and on January 19, 1920, the plaintiff, by E. I. McDowell, acting in that behalf, submitted to Harry Stultz, one of said parties, a bid, to him addressed, for said linen, referring to it as "approximately 168,400 yards," the aggregate of the two items mentioned in the advertisement hereinafter referred to, at 0.85 per yard "linen to be as per sample herewith."

Said Stultz was not an authorized representative of the United States with authority to sell said linen, but was operating in his own behalf, and no proceeding was had under said bid, so far as appears from the record. On February 2, 1920, said Stultz submitted to the material disposal and salvage division of the Air Service a bid for identic quantities of said linen in two items as in said advertisement set out, at a price of $0.87½ per yard. (Finding III, R. 8.)

It does not appear that the representative of the plaintiff acting in its behalf had seen the advertisement referred to at or before the time that the bid was submitted to said Stultz, *but said advertisement came to his attention very shortly thereafter and before February 2, 1920, under which date the said representative of the plaintiff, namely, E. I. McDowell, acting for and on behalf of the plaintiff, submitted to the Materials Disposal and Salvage Division of the Air Service the following bid:* (The bid involved herein is then set forth.) (Finding V, R. 8, 9.)

From these findings, it is evident that no authorized agent of the Government ever exhibited samples of the linen to appellants; that the present sale was not in any sense a sale by sample; and that the published advertisement, and that alone, was what gave birth to the only bid which appellants ever made for the linen directly to the Government. That bid is the one appellants are relying on in this case.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

W. MARVIN SMITH,
Attorney.

APRIL, 1926.

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SUPREME COURT OF THE UNITED STATES.

No. 291.—October Term, 1925.

William E. Iselin, James W. Cromwell, Lincoln Cromwell, et al., etc., Appellants,
vs.
The United States.
} Appeal from the Court of Claims.

[May 3, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The appellants, partners as William Iselin & Company, sued the United States for $30,000 for breach of a warranty of quality in a sale to them by the United States of airplane linen. On January 15, 1920, the United States, through the Materials Disposal & Salvage Division of the Office of the Director of Air Service, advertised for bids for 168,400 yards of aircraft linen, to be submitted February 2, 1920. The bidders were to be notified February 5th of the yardage awarded, and were then to forward a check for 10 per cent. of the purchase price, remainder within thirty days. The advertisement also stated that the materials would be sold "as is" at points of storage, that inspection was invited, that specifications and quantities on hand were based upon best information available, but that no guaranty on behalf of the Government was given.

The representative of the appellants at New York on February 2, 1920, after seeing the advertisement, sent the following letter to the Salvage Division, office of the Director of Air Service, Washington:

"I herewith submit my firm offer for approximately 168,400 yards of 38-inch grade A natural brown Irish Airplane Linen. Specifications: Minimum threads, warp and filling, 90. Maximum threads, warp and filled, 105. Minimum weight, 4.5 oz. per square yard. Average length of pieces from 60 to 80 yards, at 93 cents per yard, f. o. b. cars at present location. Said linen as per sample submitted; goods to be firsts. This offer is for immediate acceptance on usual Government terms."

Under date of February 10th, there was sent to the plaintiff's representative the following communication from the New York office of the Salvage division:

"This is to advise you that Washington has awarded you 150,400 yards of 38 inch grade A Airplane Linen at 93 cents per yard. This linen is listed on sheet No. 3955, item 1—65,400 yards, and sheet No. 2879, item 6—85,000 yards.

"2. Inasmuch as we have your check for $13,987.20 to cover 10 per cent of the sale, it is requested that you send this office certified check for $125,884.30 to cover the balance due, together with your shipping directions.

"3. This check should be drawn in favor of 'Disbursing Officer, Air Service', marking envelope for the attention of the Materials Disposal & Salvage Division, 360 Madison Ave., N. Y. C.

"4. Attention is invited to the following rule of the Air Service, which requires that payment be made promptly and material removed within 30 days of award."

It does not appear, and it is not claimed, that there was any acceptance of appellant's bid February 2nd otherwise than as embodied in the communication last above quoted.

Upon resale of the linen, the appellants found that it was not of the quality of "firsts" and brought this suit. The linen delivered was of grade A, which term describes a particular texture. The terms "first" and "seconds" are terms of quality.

The only question in this case is whether the expression "Said linen as per sample submitted; goods to be firsts", contained in the letter of February 2nd was accepted so as to bind the Government to a warranty that the linen sold was to be of first quality.

We do not think that the letter of February 10th was an acceptance of the offer of February 2nd. It does not acknowledge its receipt. It does not purport to be an answer to it. It differs from it in the yardage of the linen mentioned by 18,000 yards. It contains no reference to the quality of the linen. It refers to a check for 10 per cent. of the price bid on 150,400 yards of linen, which could not have been sent in the letter of February 2nd, for it was for a less amount. This shows, as indeed the counsel for the appellants himself points out, that there must have been some negotiations, or inquiries or communications between the appellants and the Government after the letter of February 2nd before the exact amounts of the linen and the deposit check could be fixed. The contract is not found in the letter of February 2nd. It is evidenced

by the tender of the deposit check, by the letter of February 10th only, and by the payment of the balance due on the contract price. It is reasonable to infer that the letter of February 10th was a belated award under the advertisement rather than an acceptance of the letter of February 2nd.

It is well settled that a proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. *Beaumont* v. *Prieto,* 249 U. S. 554; *Minneapolis Railway* v. *Columbus Rolling Mill,* 119 U. S. 149, 151; *National Bank* v. *Hall,* 101 U. S. 43, 50; *Carr* v. *Duvall,* 14 Pet. 77, 82; *Eliason* v. *Henshaw,* 4 Wheat. 228.

We must conclude that the Government never entered into a warranty of the quality of the linen and so, that no obligation arose from a breach. The judgment of the Court of Claims is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.